NO. 21374

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROGER LEE GLAVIN and
ROBERT LORING CHESNEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

On May 25, 1966, a three count indictment was returned by the Grand Jury for the Southern District of California [C. T. 2-4]. 1/

The first count charged that on or about March 21, 1966, appellant Roger Lee Glavin transported a stolen 1966 International Harvester truck in interstate commerce from Los Angeles, California to Vero Beach, Florida, knowing said vehicle to have

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1/ C. T. refers to Clerk's Transcript of Record.

been stolen. Further, appellant Robert Loring Chesney and defendant Leon Leroy Glavin aided, abetted, counseled, induced and procured the commission of the above offense.

The second count charged that on or about April 15, 1966, appellant Roger Lee Glavin transported another stolen 1966 International Harvester truck in interstate commerce from Los Angeles, California to Lima, Ohio, knowing said vehicle to have been stolen. Further, appellant Robert Loring Chesney and defendant Leon Leroy Glavin aided, abetted, counseled, induced and procured the commission of the above offense.

The third count charged that on or about April 15, 1966, appellant Roger Lee Glavin transported a 1962 Highway refrigerated trailer, of a value of more than $5,000 in interstate commerce from Los Angeles, California to Lima, Ohio, which trailer had been stolen as the defendant well knew.

On June 6, 1966, appellant Roger Lee Glavin appeared with his retained counsel G. G. Bauman, was arraigned and entered a plea of not guilty to all counts of the indictment [C. T. 5].

On June 6, 1966, appellant Robert Loring Chesney appeared with his retained counsel G. G. Bauman, was arraigned and entered a plea of not guilty to all counts of the indictment [C. T. 5].

On June 6, 1966, Jerome Glaser was appointed to represent Leon Glavin, who was arraigned and entered a plea of not guilty to the indictment [C. T. 5].

The jury was impaneled on June 27, 1966 [C. T. 6]. Trial was held on June 27, 28, 29 and 30, 1966 [C. T. 6, 19-21]. On

June 30, 1966, the appellants and defendant were found guilty as charged in the indictment [C. T. 21].

On July 12, 1966, appellant Roger Lee Glavin was committed to the custody of the Attorney General for a period of five years on each of Counts One, Two and Three of the indictment. The sentences were to run concurrently [C. T. 30].

On July 12, 1966, appellant Robert Loring Chesney was committed to the custody of the Attorney General for a period of five years on each of Counts One and Two of the indictment. The sentences were to run concurrently [C. T. 31].

Appellants filed timely Notice of Appeal on July 13, 1966 [C. T. 32].

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 18, United States Code, Sections 2312, 2314 and 2. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2312 provides:

> "Whoever transports in interstate or foreign commerce a motor vehicle . . ., knowing the same to have been stolen, shall be fined not more than

$5,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 2314 provides:

"Whoever transports in interstate . . . commerce any goods, wares, merchandise . . . of the value of $5,000 or more, knowing the same to have been stolen . . . shall be fined not more than $10,000 or imprisoned not more than 10 years, or both."

Title 18, United States Code, Section 2 provides:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

III

STATEMENT OF FACTS

The first working day in March 1966 an inventory was taken of trucks located at the Montebello Branch Office of International Harvester Corporation. The inventory disclosed that a new International Harvester truck with a wheel base of 212 inches, 10 wheels, and powered by a Cummins diesel engine was missing [R. T. 11-12]. 2/ (A 212" wheel base is a long wheelbase truck [R. T. 89].) Investigation disclosed that the last time the truck

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2/ R. T. refers to Reporter's Transcript.

was seen on the premises was February 9, 1966 [R. T. 21]. The missing International tractor was identified by chassis No. W-1446 H and engine number 440304 [R. T. 16, 52]. The chassis contained the following component parts: Forward Rear Axle No. 5023-X, Rear Rear Axle No. 5039, and cab number W-1446-H [R. T. 55-56]. The engine was fitted with fuel pump No. 357822 [R. T. 161].

During the first part of February 1966 Roger Glavin rented a garage in North Hollywood, California using the name John L. Wilson [R. T. 72-74, 84]. Shortly thereafter Roger Glavin brought a new 1966 International Harvester truck to the garage. The truck was white with a black frame and had a long wheelbase. In order to get the truck into the garage it was necessary for Glavin to cut three feet off the back rails [R. T. 75]. A Mr. Hellinger, who had a shop in the same vicinity, observed Glavin and other individuals working on this truck on various occasions [R. T. 72, 76]. Mr. Hellinger observed that a fifth wheel was placed on the truck and that the air cleaner and exhaust system was altered [R. T. 76, 79]. One evening Mr. Hellinger went down to the building and observed three people working around the vicinity of the frame of the truck, Roger Glavin, Leon Glavin and Robert Loring Chesney [R. T. 76-78, 132, 149]. Roger Glavin and Leon Glavin were standing while Robert Loring Chesney was down at the frame of the truck [R. T. 149]. He saw sanding tools in the vicinity of the frame. Roger Glavin told him that the Department of Motor Vehicles had given him the wrong numbers and they had

to change the existing ones [R. T. 90-91]. Later Roger Glavin and Leon Glavin rented a compressor and painted the truck red and while [R. T. 79-80]. Before the end of the month, Roger Glavin had taken the truck and left [R. T. 80].

In late February and March of 1966 Mr. Abraham Carmody was a partner in the Western Fruit Express Company. Western Fruit Express was a company engaged in hauling produce across the country. Western Fruit Express would enter into agreements with truck drivers whereby the drivers would furnish their own vehicles and Western Fruit Express would furnish trailers and arrange hauling jobs [R. T. 223-224].

During the first part of March 1966 Roger Glavin went to Western Fruit Express and inquired about a job hauling freight with his truck. He had a red and white 1966 International Harvester truck with a long wheelbase [R. T. 224-225]. Roger Glavin entered into an employment agreement with Western Fruit Express and drove a load from Los Angeles to Vero Beach, Florida [R. T. 226-230, 301]. He picked up a load in Vero Beach, Florida and was proceeding back to California when he got into a wreck in Texas. Since the trailer was damaged he put the produce in cold storage and brought the truck and trailer back to California [R. T. 230]. On this trip for Western Fruit Express appellant Glavin drove the long wheelbase red and white International truck. This truck had license No. X84086 [R. T. 230, 233-235].

On April 12, 1966 an inventory was taken of the trucks located at the Glendale Branch of the International Harvester

Corporation [R. T. 43]. The inventories are generally taken at one week intervals [R. T. 41]. The inventory disclosed that a 1966 International Harvester 3-axle truck with a diesel engine and an air conditioner was missing [R. T. 32]. The missing International Harvester truck was identified by serial number 6821 and engine number 481940 [R. T. 33]. Further, chassis number 6821 included the following competent parts: forward rear axle 23441, rear rear axle 22845 and cab number A 47271 [R. T. 58-60]. All efforts to locate this particular truck failed [R. T. 36].

Mr. Detlaf M. Simon is president of Hauling Equipment, Inc. His company sells new and used semi-trailers and it owned a 40-foot 1962 Highway refrigerated trailer with a value of $6,000 [R. T. 180-181]. The trailer had a transicold diesel powered refrigerator unit with Serial Number 8421 and a small door on the curb side [R. T. 183-185]. On April 9, 1966 the above described trailer disappeared from the sales lot of Hauling Equipment, Inc. [R. T. 182].

On April 10, 1966, Bazil B. Buehler, an acquaintance of both appellants and Leon Glavin, went to Leon Glavin's house [R. T. 455]. When he arrived he observed Roger Glavin and Robert Loring Chesney working on a large black and white truck. Both appellants were preparing the truck for painting [R. T. 455]. Appellant Chesney told Beuhler that he was not a good painter and offered to pay Beuhler to paint the truck. Beuhler refused indicating that he didn't have time [R. T. 457]. The truck was basically the same type as another truck he had seen at Leon

Glavin's house [R. T. 458].

Larry Rexius is a truck driver [R. T.]42]. On April 12, 1966 Leon Glavin came to a gas station where Rexius was talking to a friend and inquired if anyone was looking for a job [R. T. 243]. The job was as a driver hauling produce with his brother Roger Glavin [R. T. 244-245]. Rexius went to work for Roger Glavin and on April 14, 1966 left on a haul from Los Angeles, California to Lima, Ohio [R. T. 242, 252]. After the load was delivered in Ohio they picked up another load and returned to California [R. T. 252-253]. The trip was made in a two tone red and white 1966 International Harvester truck with an air conditioner and short wheelbase [R. T. 249]. The truck towed a 40-foot 1962 Highway trailer with a transicold unit [R. T. 249-250].

Mr. William West is a self-employed truck repairman working in a shop complex located at 11133 San Fernando Road, San Fernando, California [R. T. 385]. In April of 1966 Leon Glavin and Robert Loring Chesney approached him with regard to renting one of the shops in that complex [R. T. 386]. Leon Glavin said they had a truck they wanted to store until they obtained a permit [R. T. 387]. Robert Loring Chesney inquired as to the source and amount of electrical power and said that they didn't know whether they would keep the shop long enough to move their welder and machinery in as they might move to Los Angeles where the work was located [R. T. 387]. Later Leon Glavin brought the long wheelbase truck down to the shop [R. T. 388]. He indicated that he and Chesney were partners in the business and had two trucks

[R. T. 390]. Further that one of the trucks was on a trip back east with his brother [R. T. 392]. Leon Glavin also asked if Mr. West could shorten the wheelbase on this long wheelbase tractor [R. T. 392].

Robert Gibson is a sergeant with the Los Angeles Police Department [R. T. 292]. He was working on the theft of two 1966 International Harvester trucks in the Los Angeles area. On May 2, 1966 at 9:30 A. M., he observed a long wheelbase 1966 International truck in front of an apartment at 6034-1/2 Vineland Avenue. He walked up to this International truck and by looking between the front fender and tire of the vehicle he was able to observe that there was no identification plate on the rear of the engine [R. T. 292]. Further, he saw that the engine had a cast date of 3/5/65 and fuel pump number 357822. He then walked away from the truck and went back and met his partner George Moeller and Lyman Ross of the National Auto Theft Bureau [R. T. 291, 283]. They waited for Mr. Kendrich of International Harvester to arrive with the fuel pump number off the truck that was stolen at Montebello. When Mr. Kendrich arrived with the fuel pump number a check disclosed that it was the same number as that which Sergeant Gibson had viewed on the truck [R. T. 293-294]. Mr. Kendrich then left and the other three individuals proceeded to drive one block away from the truck. They then parked and kept the truck under observation [R. T. 294]. At approximately 6:30 P. M., Leon Glavin came out of an apartment, got into the truck and drove away. Leon Glavin was followed by a Bazil B. Beuhler in a 1964 Comet

[R. T. 294]. These two individuals were followed to 11333 San Fernando Road, San Fernando. The door to one of the garages was opened and Leon Glavin was about to get back into the truck when he was placed under arrest [R. T. 295]. A search of the vehicle disclosed the following information and exhibits:

1. Exhibit 9-A, which was found in the cab of the truck and is a receipt from Motor Truck Distributor Company for truck parts sold to a Chesney truck [R. T. 297-298, Exhibit 9-A].
2. Exhibit 9-B, which is a Western Fruit Express Trip Report on a trip driven by Roger Glavin. It shows a truck leaving from Los Angeles, California and going to Florida [R. T. 301].
3. Exhibit 9-C which is a work order from the Cummins Diesel Sales Corporation. The work ordered was to tune the engine and check fuel pump number 357822. The work order indicates that the performed repairs were made in either North or South Carolina [R. T. 305].
4. Mr. Kendrich returned and he along with Lyman Ross examined the truck. They found that the air cleaner and exhaust system had been altered; the chassis number, cab number, engine number and turbocharge number plates had all been removed; and the frame number had been altered [R. T. 364-366]. The rear rear axle had serial

number 5089 whereas the truck taken from Montebello had 5039 [R. T. 326, 330]. The number "8" appeared to have been tampered with [R. T. 331].

Leon Glavin was held in custody but Bazil Beuhler was released [R. T. 460].

On May 3, 1966 Larry Rexius and Roger Glavin arrived back in California. Roger Glavin drove the truck to a machine shop in Glendale, California [R. T. 253]. Roger Glavin got out of the truck and went into the machine shop where he had a conversation with appellant Chesney [R. T. 253-255]. Roger Glavin and Rexius left the machine shop in the truck and proceeded towards San Francisco on the Ventura Freeway [R. T. 255].

Mr. Lyman Ross is a special agent employed by the Los Angeles office of the National Auto Theft Bureau. He was participating in the investigation of the two stolen 1966 International Harvester trucks and was present when Leon Glavin was arrested [R. T. 108-09]. On May 3, 1966, at 4:45 P. M., Mr. Ross was proceeding southbound on the Ventura Freeway when he observed a 1966 International Harvester truck pulling a trailer in a northbound direction on the same freeway. The truck had the same color combination as the one which was seized from Leon Glavin the previous night. The door had a name plate with the name Western Fruit Express. There was a refrigeration unit mounted on the cab [R. T. 109, 112]. Mr. Ross made a U-turn and followed the truck up to Montalvo where it turned into a service road. He

drove by the trailer and observed that it was a Highway trailer with no license plate. Mr. Ross stopped about 150 yards from the truck and radioed the California Highway Patrol and requested that an officer meet him at that location [R. T. 111]. Officer Imboden of the California Highway Patrol responded to the call at 5:55 P. M. [R. T. 279]. Mr. Ross told Officer Imboden that he had reason to believe that the truck and trailer parked ahead of them was stolen. He explained that one International truck had been taken from the Montebello Branch of International Harvester and one other International Harvester truck had been taken from the Glendale Branch of International Harvester; that the Montebello truck had been recovered the night before from a Leon Glavin and this second truck was painted with the same color combination as the recovered truck. He stated that the trailer was similar to one stolen in East Los Angeles [R. T. 111, 406].

Officer Imboden and Mr. Ross followed the truck to the Montalvo Highway Patrol Truck Scales. At approximately 6:25 P. M. the truck pulled into the scales and was pulled over to a parking area [R. T. 112]. Officer Imboden approached the truck and asked appellant Roger Glavin for the registration papers. He proceeded to check the trailer and observed there was no license plate affixed thereto. The truck had a front license plate but no rear license plate and the front plate had no quarterly registration. The appellant Roger Glavin handed Officer Imboden a blue suspense receipt that showed no description of the vehicle at all [R. T. 280]. At this time Mr. Ross walked over to the left hand door of the cab

and opened it. He observed the serial plate that was attached to the outer edge of the left hand door and saw that the cab serial number was A-47271. Mr. Ross checked this number against the serial number he had in his possession for the Glendale truck and found them to be the same [R. T. 112]. Mr. Ross then called Officer Imboden over to the left side of the truck from the right side where he was talking to appellant Glavin. He pointed out the brass identification plate on the door to Officer Imboden and showed him a number in a book he had in his possession. He told Officer Imboden that this number corresponded to the number on the truck that was stolen. Officer Imboden compared the two numbers and observing that they were the same then placed Roger Glavin under arrest [R. T. 280-281]. This arrest took place approximately 15 minutes after the truck pulled into the scales [R. T. 113].

The truck was then searched and the search disclosed the following documents and information:

1. The truck bore front rear axle number 28441. The truck that was taken from Glendale had axle number 23441. The "8" was much heavier than the remainder of the numbers [R. T. 414-415].
2. The Highway Trailer had a Transicold Refrigeration unit bearing serial number 8421 [R. T. 419].
3. Exhibit 12-E thirteen receipts for diesel fuel. Ten of the receipts were charge tickets and bore a credit card number and the name Robert L. Chesney [R. T. 420, 445-446].

4. A Drivers Log Record in the name Roger Glavin. This log record shows a trip from Los Angeles, California to Lima, Ohio [R. T. 434-436].

After the truck was examined it was placed in storage at Owl Storage Yard in Oxnard [R. T. 281]. Mr. Simons went to Owl Storage and conducted an extensive examination of the trailer. He came to the conclusion that this was the trailer taken from his sales lot on April 6, 1966 [R. T. 189-191].

Shortly before 2:00 on May 3, 1966, Robert Loring Chesney telephoned Bazil Buehler at his home [R. T. 459-461]. He asked Mr. Buehler what had happened the night before. Buehler explained that he and Leon Glavin were arrested for grand theft and that he was released and Leon was held. Buehler testified as follows concerning what he was told by Chesney:

> "That Roger was here, this was his words, Roger was here but Roger didn't want to come over to the house, meaning Lee's house, and he didn't want to come over, and asked me if I would get a package from the house for him, he said it was kind of important for him." [R. T. 461, lines 8-16].

Buehler testified that Chesney told him both he and Roger Glavin didn't want to go to Leon's house [R. T. 472]. Chesney went on to explain that the package contained envelopes, license tags, pink slips and papers [R. T. 461]. After this conversation Buehler called Sergeant Moeller of the Los Angeles Police Department and explained what had happened. Sergeant Moeller told

Buehler to go ahead and obtain the package and then call him. Buehler then went back to work [R. T. 461].

On May 3, 1966 Kittia Buehler went to the home of Leon Glavin to pick up her son [R. T. 449]. Leon Glavin's wife, Barbara Glavin, gave her a paper bag and asked her to take it home. She took it back to her house and put it in a closet [R. T. 449-450]. Later that day Robert Loring Chesney called and asked for her husband's phone number which she gave to him [R. T. 452].

Shortly after 5:30 P. M. Bazil Buehler returned home from work. He told his wife that he had to go down to Leon Glavin's and get some things and take them to Chesney's machine shop. His wife showed him a bag of articles she had received earlier that day from Barbara Glavin [R. T. 461]. He looked in the bag and observed 4 manila folders, a license tag and an aluminum plate [R. T. 462].

Mr. Buehler left his house and drove to a pay phone and called the police. He explained to them that he had the items Chesney had requested and they arranged a meeting. He met police Officers Moeller and Gibson and an FBI agent at the corner of San Fernando Road and Colorado Street [R. T. 462]. The items were taken down to the Los Angeles Police Department where they were photographed and labeled [R. T. 462, 485]. The items were then returned to Buehler in their original form.

Mr. Buehler proceeded to Robert Loring Chesney's place of business followed by the police officers. When he could not locate Chesney he drove to a phone booth in a gas station [R. T. 463, 475].

The police officers arrived and Buehler informed them that he was going to call Chesney and they agreed [R. T. 475, 513]. While Officer Moeller stood in the doorway of the phone booth, Buehler called Chesney at home [R. T. 514]. Buehler told Chesney where he was located and Chesney said it was rather late to come all the way down to the machine shop. Chesney asked Buehler if he knew where the Greyhound Bus Depot in North Hollywood was located. Chesney said that he would meet him there and would be driving a blue T-Bird [R. T. 463, 476]. Buehler related this conversation to Officer Moeller and then drove down to the bus terminal [R. T. 464, 515]. He parked his car and waited for a period of time. About 12:15 Chesney drove into the parking lot in a blue T-Bird and parked a short distance from Buehler's automobile. Chesney walked over to Buehler's automobile and Buehler opened the trunk of the car and gave him the bundle [R. T. 464, 517]. Chesney unwrapped the bundle and looked in and saw the license tags and packages [R. T. 480]. He said "he was glad to get it, because if it got into the wrong hands it would put them all behind bars" [R. T. 465, lines 2-6]. Chesney then turned and walked towards his car at which time he was placed under arrest and the package taken from his possession [R. T. 486].

Among the various items found in the package were the following:

1. A license plate bearing the number X84086 [R. T. 490].

2. Four manila envelopes. One bore the name

"Trailer" [R. T. 496], another the name "Checks" [R. T. 501], another the name "Truck" [R. T. 502 and the fourth the name "I. D. Plates" [R. T. 503].

3. One of the envelopes contained Cummins Engine I. D. Tag Number 481940 [R. T. 506]. This is the same engine number as the tractor taken from Glendale [R. T. 508].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal: 3/

1. Appellant's Constitutional Rights Denied by Jury Instruction Given.
2. Right to Adequate Assistance of Counsel Denied.
3. The Entrapment and "Deposit and Seizure" of Evidence on the Defendant Was Illegal, Rendering the Evidence Inadmissible.
4. There was Unlawful Search and Seizure Rendering Evidence Seized Inadmissible.
5. Admitting Hearsay Document Not Found in the Possession of the Defendant Against Whom Admitted and Without Any Foundation Connecting

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3/ Appellant's Opening Brief.

Defendant Thereto was Prejudicial Error.

V

ARGUMENT

A. THE COURT PROPERLY INSTRUCTED THE JURY THAT THEY MAY DRAW CERTAIN INFERENCES FROM POSSESSION OF PROPERTY RECENTLY STOLEN.

We agree with appellants that an accused is innocent until proven guilty and that presumptions of guilt are violative of basic due process protections. However, the instruction given did not state a presumption of guilt but stated an inference which the jury was told was merely permissible [R. T. 596-598]. Additionally, the appellant does not maintain the instruction was stated a presumption, but that it may have appeared to a jury to have stated a presumption.

The courts have long been aware of the differences between presumptions and inferences: presumptions demand conclusions, unless, of course, successfully rebutted; inference merely means that a conclusory jump from A to B is logically permissible but does not demand it. United States v. Gainey, 380 U.S. 63; Tot v. United States, 319 U.S. 463 (1943); Morandy v. United States, 170 F.2d 5 (9th Cir. 1948); Booth v. United States, 154 F. 2d 73 (9th Cir. 1946).

The instruction given in the instant case involved an inference. In United States v. Gainey, supra, the charge to the

jury was as follows:

> "Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was no engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

The court found that these words not only constituted an inference rather than a presumption, but were clearly understandable as such to the jury of laymen. The comparable part of the instruction in the case at hand follows:

> "Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.
>
> "And possession of property recently stolen, if not satisfactorily explained, is also ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case,

that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property."

* * * * *

"If the jury should find beyond reasonable doubt from the evidence in the case that the International Tractor described in Count I of the indictment were stolen, and that while recently stolen, the property was in the possession of one of the accused, the jury would ordinarily be justified in drawing from those facts the inference, not only that the International tractor was possessed by the accused with knowledge that the property was stolen, but also that the accused participated in some way in the theft of the property, unless possession of the recently-stolen property by the accused is explained to the satisfaction of the jury by other facts and circumstances in the evidence in the case; and the same proviso applies in the case of the tractor in Count II."

* * * * *

"It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw from the possession of recently-stolen property.

If any possession the accused may have had of recently-stolen property is consistent with innocence, the jury should acquit the accused."

More clearly than in Gainey, supra, the words here indicate that the conclusion is not mandatory, but only permissible. Specifically, "the jury may reasonably draw the inference and find "and" it is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw" is more clearly an inference than the comparable part in Gainey, supra. In addition, this instruction does not limit the jury to the sole consideration of the circumstance of finding in light of "all the facts and circumstances" here.

Further, the constitutionality of an inference of this type depends upon the rationality of the connection between the facts proved and the ultimate fact inferred. Tot v. United States, 319 U.S. 463, 466 (1943); United States v. Gainey, supra, at 66-67. The collective experience of the police and the courts, in California and elsewhere, has established that there is a strong connection between the possession of the stolen goods recently after a crime, and knowledge of the actual commission of the crime. This specific rational connection asserted herein has been found and sustained in Morandy v. United States, 170 F.2d 5, 6 (9th Cir. 1958), " . . . 'the law is that possession of the fruits of a crime recently after its commission, -- namely, here, the automobile, in the absence of an explanation justifying the

possession, warrants an inference pointing towards guilt. The inference fades as time elapses.' We think the instruction correctly stated the law. Affirmed."

Appellant also argues the instruction violates his Fifth Amendment rights. We submit the instruction does not curtail appellants' Fifth Amendment right not to testify, nor does it amount to an unconstitutional comment on his failure to testify. It puts no direct pressure on the appellants to testify. The instruction takes special care to remind the jury that appellants need not testify and that the incriminating circumstances may be explained by other means of presenting evidence.

> "In considering whether possession of recently stolen property has been satisfactorily explained, the jury will bear in mind that in the exercise of Constitutional rights, the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused." [R. T. 598].

The trial court took special precaution to point out to the jury that exercise of the constitutional right leads to neither presumption nor inference of guilt.

> "A defendant in a criminal case is not required to take the stand and testify. When he chooses this course of action, no presumption of guilt may be raised and no inference adverse to

him may be drawn from this fact by the jury. The defendant, having availed himself of this privilege, you are to draw no inference of guilt against him from it."

The entire instruction exhibits a heightened awareness of the seriousness of the jury's task. The court time and again stressed the right of the defendant not to testify and not to have this weigh against him; it stressed that the burden of proof to prove guilt beyond a reasonable doubt was always with the Government and was very high [R. T. 589, 599]; that reasonable doubt exists when the jurors are not convinced to a moral certainty that defendant is guilty [R. T. 595]; that evidence other than direct testimony from the defendant can dispel the inference; and that the jury is not to infer guilt from defendant's silence [R. T. 600]. These statements protecting defendant against the possibility of a jury presuming guilt from silence is diametrically opposed to the condemned comments offered by the court and prosecutor in Griffin v. California, 380 U.S. 609 (1965). We submit, in conclusion, that the judge gave an instruction designed to protect the defendants' fundamental Fifth Amendment rights against conscious and unconscious incursions on them by the court and the jury.

B. NEITHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHTS TO ADEQUATE ASSISTANCE OF COUNSEL.

1. There Was No Abuse of Discretion By the Trial Judge in Denying Counsel's Motion to be Relieved From Representing Roger Glavin.

On the morning of trial, June 27, 1966, appellant's attorney, Mr. G. G. Bauman, indicated to the court that "it appears there may perhaps be a conflict of interest" in his representation, and asked to be relieved of representing Mr. Glavin. Judge Goodwin denied the motion on the grounds that appellants are entitled to a speedy trial, that the case has been prepared on both sides, and that the appellants had been out on bond since early in May, a sufficient time to secure the representation they desired [S. R. T. 2]. 4/ The court was aware that the estimated trial period was approximately 4 days; additionally, the government in fact called 17 witnesses, many of whom were in attendance to their own inconvenience having come from as far as Indiana.

The essential question regarding the trial judge's discretion in this case, is whether the mere mention of the possibility of a conflict in representation is automatically and absolutely sufficient to cause the trial judge to delay the trial and relieve counsel of his duty. A broad generalization to this effect may be

4/ S. R. T. refers to Supplemental Reporter's Transcript.

found in Glasser v. United States, 315 U.S. 60, 67, 62 S. Ct. 457 (1941). Yet in spite of this broad generalization by the Supreme Court, the majority could not divorce itself from an intensive investigation of the facts found in the record [pp. 72-75]. The record showed a conflict. We submit that the court in Glasser was primarily holding that in a close case, a motion to vacate because of the possibility of a conflict in representation cannot be decided merely on the discretionary foresight of the trial judge, but must be considered in light of the facts on the record.

Hayman v. United States, 205 F.2d 891, 894 (9th Cir. 1953);

See: Gardiner v. United States, 237 F. Supp. 692 (S.D. Texas 1964).

Further, we submit that the court in Glasser recognized that mere mention of a possible conflict of interest does not demand substitution of counsel. Action on the motion remains subject to judges discretion.

> "Upon the trial judge rest the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right of jury trial for the accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid undue departures from that mode of trial or from any of the essential

elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.'

Patton v. United States, 281 U.S. 276, 312-313."

Glasser v. United States, supra, at p. 71.

Therefore, the facts of the particular situation are apparently at the focus of the court's eye and attention, and the judge is not to grant or dismiss a motion "as a matter of rote", but is to view the situation at hand.

The court in reviewing the discretionary ruling should look to the facts available to the trial judge; the facts upon which he based his ruling.

If this Court should rule on the exercise of discretion by the trial judge without viewing the trial record, on grounds stated before, i.e., constitutional protection of a speedy trial, sufficient opportunity for appellants to obtain counsel of their choice, great inconvenience to the government and its witnesses, and the orderly administration of justice in the Federal Courts, then the trial judge was entirely within his discretion in refusing the sketchily phrased motion of appellants.

2. The Appellant Has Failed to Carry the Burden of Proving By a Preponderance of the Evidence on the Record, That a Conflict of Interest Existed.

In both the motion before the trial judge, and here again on appeal, appellants have merely alleged a conflict of representation.

In neither instance have they pointed to a specific showing of this conflict, despite the generally accepted requirement that appellant do more than merely allege a violation of constitutional rights. The court in Daughtrey v. United States, 242 F. Supp. 771 (1964) sets forth the procedure to be followed in collaterally attacking a sentence on constitutional grounds. "On a motion to vacate sentence, the burden is on the petitioner to prove by the preponderance of the evidence, those contentions he sets forth as depriving him of his constitutional and lawful rights." And, ". . . in overcoming the presumption of regularity in a court proceeding, the defendant must set forth facts with sufficient particularity as to make them appear more than mere conclusions, thereby warranting their belief." Daughtrey v. United States, supra, at 774. Sanders v. United States, 373 U.S. 1, 5, 6 (1963); Rayborn v. United States, 251 F. 2d 950 (6th Cir. 1958); Hearn v. United States, 194 F. 2d 647 (7th Cir. 1952); United States v. Bostic, 206 F. Supp. 855 (D. C. Cir. 1962); Hayes v. United States, 208 F. Supp. 178, 182 (E. D. N. C. 1962). This procedure should likewise apply to a direct appeal on constitutional grounds.

We submit that where counsel has the facts beforehand and in the alternative the record before him, it is his duty to specify his complaint both for the trial judge and for this court and opposing counsel on appeal.

3) The Record Shows No Conflict of Interest.

We submit that the appellants were not denied the constitutional right to adequate assistance of counsel. The test of adequate

representation in light of a claim of conflict of interest was stated by this Court in Hayman v. United States, 205 F. 2d 891 (9th Cir. 1953).

> "Be that as it may, we look to the facts to see whether anything was done or whether there was any omission to do anything other than that which a competent and free-to-act lawyer would be justified in doing or in not doing." p. 894.

The only stated ground of conflict of interest was that Roger Glavin and his attorney did not agree on the manner of representation. Yet Roger Glavin was patently guilty - the evidence against him was overwhelming - the jury deliberated a mere 2-1/2 hours, a very short time considering the complexity of the case. It has been the experience of us all that a client and his lawyer do not always see eye to eye, yet that surely is not to indicate a conflict of interest or inadequate assistance of counsel. Mr. Baumen several times made motions to suppress evidence he felt prejudicial to his client, and examination of the witnesses was on a high level at all times.

Loring Chesney's defense was constructed about a different tactic. The evidence against him, although sufficient in the jury's consideration to convict, was not as full or as weighty. Using the Fifth Amendment right to its fullest extent, counsel attempted to maintain the presumption of innocence by insufficiency of evidence. But because the tactic failed, because the jury felt beyond a reasonable doubt and to a moral certainty that Mr. Chesney was

guilty, is not evidence of a conflict of interest.

We respectfully submit, with all deference paid to the fundamental importance of the constitutional protection to adequate assistance of counsel, that appellants have received the fullest protection our legal system affords, the protection and benefit of "vigorous, experienced and competent counsel at each stage of the proceedings". McDonald v. United States, 282 F.2d 737, 743 (9th Cir. 1960).

C. ADMISSION OF EVIDENCE FOUND IN THE POSSESSION OF DEFENDANT INCIDENT TO HIS ARREST WAS IN CONSONANCE WITH FOURTH AMENDMENT GUARANTEES AND CONSTITUTED COURT ACCEPTED POLICE PRACTICE AND DUTY.

Appellants' lawyer has characterized the procedure involving the arrest of Robert Loring Chesney as "having some of the attributes of entrapment" that "shocks the sense of justice". We suggest that appellant cannot classify this as entrapment because it does not have the requisite elements and that the procedure is shocking only when recounted as appellant has on pages 18 and 19 of his Brief, which, we submit, is fundamentally different from the evidence in the record.

Entrapment is first described in Sorrells v. United States, 287 U.S. 435, 451 (1932) and more recently in Sherman v. United States, 356 U.S. 369 (1958), from which the following quotation comes at page 372:

"However, a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

And further that,

". . . the fact that the government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity of law enforcement officials. . . ."
(emphasis supplied by the Court.)

The idea of the transfer of the four envelopes from Leon Glavin's home to Robert Loring Chesney with Bazil Buehler as the intermediary originated with Chesney and was told to Buehler by Chesney over the phone on May 3, 1966 [R. T. 456, 460].

"He [Chesney] said that Roger was here, this was his words, Roger was here but Roger didn't want to come over to the house, meaning Leon's house, and he [Chesney] didn't want to come over, and asked me if I would get a package from the house for him, he said it was kind of important to him." [R. T. 460].

This is corroborated on cross-examination [R. T. 472, lines 17-22]. It was Chesney, and not the police, who asked Buehler to do him the favor of going to Leon Glavin's house to get the packages to give to Chesney. It was in Chesney's mind, and not in the mind of the police, that the plan originated.

Appellants would have us believe that Chesney was ignorant of the contents of the packages and was doing Roger Glavin a favor by being the temporary repository of them. That this inference is partially unfounded in, shown above, and the claim that Chesney was ignorant of their content is negated by Bazil Buehler's testimony concerning the telephone conversation alluded to above.

> "He said it was maybe one or two envelopes that were in a package.
> He said it would be license tags and some papers and stuff, and he had a couple of pink slips, and to bring those also." [R. T. 460, 461, 473].

This information came into the hands of the police through the voluntary aid of Mr. Buehler. Buehler was arrested with Leon Glavin on the evening of May 2, 1966. Although Leon was held, Buehler was released because they believed that he was not connected with the crime. Subsequently, afraid of being dragged into the crime by Chesney, Buehler telephoned the police giving them the details of Chesney's phone call. The police, rather than being a motivating and creative force in this transfer of goods requested by Chesney, merely advised Buehler that he ought to

follow through with Chesney's instructions. They would take it from there [R. T. 461]. When the first meeting did not materialize, it was Buehler who informed the police that he would contact Chesney for another meeting, which he did [R. T. 475, 513]. It was this meeting that resulted in the transfer of the envelopes [R. T. 464, 517]. The whole process of transfer had originated with Chesney and was carried out primarily by him. At the very least, Chesney's ready compliance with what appellants' claim was the police's plan indicated a guilty mind and precludes any finding of entrapment. Roth v. United States, 270 F. 2d 655 (8th Cir. 1959); Kivette v. United States, 230 F. 2d 749 (5th Cir. 1956); Lathem v. United States, 259 F. 2d 393 (5th Cir. 1958); Accardi v. United States, 257 F. 2d 168 (5th Cir. 1958).

Throughout this chain of events, the police were no more than alert bystanders, watching the "shots" called by Chesney. Of course, they were kept aware of the whereabouts of the envelopes, but their possession amounted to a scant three hours while they photographed and labeled the items [R. T. 462, 485]. At all other times, the items were in the chain of possession of Leon Glavin, Barbara Glavin, Kittia Buehler and Robert Loring Chesney. The envelopes, were in dominion and control of these people; they had the ability to have done anything they wished with them, including destroy them. Except for a short lapse, exclusive physical control was in the unchecked and independent hands of the people within this chain.

Furthermore, nothing could have been gained by waiting

any longer. Possession was perfected by the transfer; in the period between Buehler's handing over the goods and Chesney's arrest, he had such dominion and control to do what he wished with them, such as throw them away. He chose not to. What he was going to do in the future with them is also irrelevant. Appellants may say that possession is relative to time, and is a question of degree. These legal niceties are more confusing than helpful -- when a man is holding incriminating evidence and has been vested with the power to do with them as he pleases, the sudden and rapid intervention of the police is not entrapment, but is the fulfillment of the duty of the police to society. The admission of relevant information gathered incident to a legal arrest is not a violation of the Fourth Amendment.

In addition, appellant seems to touch on the idea that the arrest was unlawful because there was no probable cause to suspect the recent commission of a crime [Brief, pp. 19-20]. We submit that the appellants may not raise this objection now because they failed to raise the objection on these grounds at trial. Toland v. United States, 365 F. 2d 304 (9th Cir. 1966). The trial judge made extensive inquiry into the exact nature of the appellants' objection. The result was two objections on the ground of entrapment, the second ground being merely entrapment described in different phrases [R. T. 490-495].

However, if the court should find that appellants have raised this objection, we contend that there was probable cause for the arrest both with and without Chesney's possession of the

envelope. An arrest made on the basis of information given the police by a citizen or a reliable informer, if it establishes probable cause, is a legal arrest. Draper v. United States, 358 U.S. 307 (1959). This immediately raises two questions, the first concerning the reliability of Buehler and the second concerning probable cause to arrest.

Buehler was arrested with Roger Glavin. However, the police believed that he was actually an innocent bystander and released him without booking. In no way did the police consider him to be part of the crime. Of his own free will he called the police to tell them how Chesney had called and asked that he do him a favor. Although he was a little closer to the sitation than is an ordinary citizen, that was all he was, because, in fact, he had nothing to gain by cooperating as he did.

However, if the court wishes to treat him as an informant, it should note that he was a reliable informer. A reliable informer is not solely one who has been proven reliable in the past; he may be one whose information bears itself out during the entire time it is being given. "There are actually two ways in which the information given by an informer can be proved 'reliable'. If 'X'

once tells police officer 'Y' that he has cause to believe some illegal act will take place, or some certain fact exists, and 'Y' subsequently finds out such statement of 'X' is true, thereafter 'Y' has some reason to trust and rely on the accuracy of informant 'X'." And "The second way . . . is actual appearance, at the time and place specified in such information . . . that was predicted". Jones v. United States, 326 F.2d 124, 128-139 (9th Cir. 1963). The court uses Draper v. United States, supra, as an example. In the instant case, the record shows verification of Buehler's accuracy and reliability on both methods. First, he called police and told them of Chesney's call and said that he expected several envelopes. He then got the envelopes in the generally predicted way. Further, he arranged a meeting with Chesney, and told police where it would be, when it would be, what kind of car Chesney would drive, and most importantly, that Chesney would take the envelopes of which all the parties knew the content. This accuracy in both instances easily meets the level of standards set forth by Draper and Jones, supra.

The question remains whether the police, accepting the reliability of this information, had probable cause to arrest. This depends on the knowledge of the police at the time of the arrest, and the natural and reasonable consequent suspicions that this knowledge would lead to. Draper v. United States, supra, at 313; Brinegar v. United States, 338 U.S. 160, 175. First, the police knew that two tractors and a trailer had been stolen and that certain plates and paper were removed and/or altered. Second,

they knew that Roger Glavin had been caught and arrested with a tractor and trailer and that Leon Glavin had been arrested the night before. Third, they knew of the telephone call of Chesney to Buehler and of the contents of the package. Everything that Buehler had told them about the packages and the favor he was to do for Chesney had worked out as Buehler said it would. That Buehler was doing a favor for Chesney in getting the material from the Glavins is an influential point towards the connection between the Glavins and Chesney. Chesney begins to look like an organizer of the scheme, having a finger in all these pots and some control over the scheme. Fourth, they knew of the telephone call of Buehler to Chesney to establish the second meeting place, and they also had the verification of finding Chesney at that pre-appointed spot. This evidence meets the requirements of probable cause to arrest Chesney for suspicion of grand theft. Sandez v. United States, 239 F.2d 239 (9th Cir. 1956); Bates v. United States, 352 F.2d 399 (9th Cir. 1965); Elkanich v. United States, 327 F.2d 417 (9th Cir. 1964), cert. denied 377 U.S. 917. Brinegar, supra; Draper, supra. That Chesney was arrested while in possession of the envelopes, of which, by Mr. and Mrs. Buehler's testimony, he knew the content, merely reinforces the existence of probable cause.

D. EVIDENCE TAKEN FROM ROGER GLAVIN INCIDENTAL TO HIS ARREST WAS PROPERLY ADMITTED.

On May 3, 1966, while participating in the investigation of two stolen 1966 International Harvester trucks, Lyman Ross, a special agent of the National Auto Theft Bureau, spotted a truck pulling a trailer northbound on the Ventura Freeway. The truck had the same color combination as the one seized from Leon Glavin the night before. On the door was printed Western Fruit Express. A refrigeration unit was mounted on the cab. Ross turned around, followed the truck as it entered a service road. He noticed the trailer had no license plate. He radioed the California Highway Patrol and requested an officer to meet him where he had stopped, about 150 yards behind the truck. When Officer Imboden arrived, Ross explained to him the suspicious circumstances. He told him that there was an International Harvester truck taken from the Montebello Branch of International Harvester and the Glendale Branch of International Harvester; that the Montebello truck had been recovered the night before but the Glendale truck was still out. Further, that the International Truck ahead of them was painted with the same color combination as the one seized the night before and the trailer it was towing was similar to one stolen in East Los Angeles [R. T. 111, 406].

When the truck pulled into the scales at Montalvo the driver was directed into a parking area [R. T. 112]. Officer Imboden approached the truck and asked Roger Glavin for the

registration papers. He proceeded to check the trailer and observed there was no license plate affixed thereto. The truck had a front license plate but no rear plate and the front plate had no quarterly registration [R. T. 280]. Roger Glavin handed Officer Imboden a blue suspense receipt which had no vehicle description.

Mr. Ross was viewing the other side of the truck from where Imboden and Glavin were talking. Mr. Ross opened the left hand door of the cab and observed the serial plate that was attached to the outer edge of the door. He saw that the number was A-47271. He checked this number against the serial number he had in his possession for the Glendale truck and found them to be the same [R. T. 112]. Mr. Ross then called Officer Imboden over to the left side of the truck. He pointed out the brass identification plate on the door and showed him the number that he had for the stolen Glendale truck. Officer Imboden compared the two numbers and observing that they were the same placed Roger Glavin under arrest [R. T. 280-281]. This arrest took place approximately 15 minutes after the truck pulled into the scales [R. T. 113].

The information supplied to the police officer by Lyman Ross, even if it had not been lawfully gotten, was admissible as evidence. The United States may use as evidence incriminating information made known to it by private individuals even if procured by a wrongful search of the accused's possessions. Burdeau v. McDowell, 256 U.S. 465 (1921); United States v. Goldberg, 330 F.2d 30 (3rd Cir. 1964). Lyman Ross is a private citizen in the

employ of a private investigating service which does work primarily for insurance companies. Although he has aided the police in the past, and his reliability is excellent, his contact with the police is only incidental to his primary employment. His search was as a private person and his disclosure to the police therefore fits within the Burdeau, supra, rule. It is admissible.

However, if the court believes that Mr. Ross' activities are such that he should be treated as an agent of the police, then we submit that the information that he turned up was fully admissible as evidence since it was gathered in the permissible activity of identifying the car more precisely.

In Cotton v. United States, 371 F.2d 385 (9th Cir. 1965), a police officer identified a stolen car more precisely by checking the serial number on the car door. He had asked Cotton if he could search the car, but neglected to advise him that he could refuse. In spite of this possible violation of Cotton's rights, the evidence thereby discovered, i.e., that this was a stolen car, was admissible. This Court there said, "But we are of the opinion that, when a policeman or a federal agent having jurisdiction has reasonable cause to believe that a car has been stolen, or has any other legitimate reason to identify a car, he may open a door to check the serial number, or open the hood to check the motor number, and that he need not obtain a warrant before doing so in a case where the car is already otherwise lawfully available to him."

Officer Imboden was operating within his lawfully assigned

area. He was within his physical jurisdiction. Based on the information of Lyman Ross, arguably acting as a police agent, Officer Imboden had reasonable cause to believe the truck and trailer were stolen or at the very least had legitimate reason to identify the truck. Finally, the truck was lawfully available to him, being stopped at a weighing station, and additionally, having no rear license plate, a fact easily observable by the officer, he had reason to check on this. The existence of these factors legitimated the action of the police and his "agent" in opening the door and looking at the serial number. Legally gathered information is admissible evidence. We respectfully submit that the information gathered by Mr. Ross and Officer Imboden was admissible.

E. GOVERNMENT EXHIBITS 12-E, RECEIPTS FOR GASOLINE CHARGED TO ROBERT L. CHESNEY, AND 9-A, A RECEIPT FOR TRUCK PARTS SOLD TO "CHESNEY TRUCK", WERE CORRECTLY RECEIVED INTO EVIDENCE.

A ruling of relevance is within the sound discretion of the judge, and ordinarily will not be disturbed upon appeal except for grave abuse. Hardy v. United States, 335 F.2d 288 (D.C. Cir. 1964). We respectfully urge that the trial judge carefully considered the objections by counsel for appellants, and then, considering the probative value of the exhibits, allowed them to be entered into evidence [R. T. 336-343; 421-422]. The trial judge, insisted on a

practical and common sense approach to the inferences that might be drawn from the evidence. We believe that his approach and decision was correct, or at least, so nearly correct as not to be the clear abuse of discretion that would require this Court to reverse him.

An individual piece of evidence does not establish guilt. Each piece must be considered in its relation to all other pieces. The relevance of one piece to the creation of an accurate account of the entire act under scrutiny can only be measured in light of the surrounding facts.

> " . . . most convictions result from the cumulation of bits of proof which, taken singly, would not be enough in the mind of a fair minded person. All that is necessary and all that is possible, is that each bit may have enough rational connection with the issue to be considered a factor contributing to an answer."
>
> United States v. Pugliese, 153 F.2d 497, 500 (2nd Cir. 1945).

> "Whether a particular circumstance is so clearly interwoven with the primary deed as to constitute a piece in the pattern of the episode in its entirety, hence necessary to set off the charge on trial in proper perspective, must be determined in the light of the particular facts of each case."

Gromley v. United States, 167 F.2d 454, 458 (4th Cir. 1948).

These two pieces of evidence fit into an entire picture of the rather close relationship between Robert Loring Chesney and the Glavins. The record shows that Chesney had frequent and often clandestine contact with the Glavins towards their pursuit of the crime. Concerning the long wheelbase truck, Mr. Hellinger testified that he saw Roger and Leon Glavin standing near the truck while Robert Loring Chesney was down at the frame [R. T. 149]. Roger Glavin indicated that they were changing the serial numbers on the truck [R. T. 90-91]. When the truck was finally identified, it was found that the serial numbers were in fact changed [R. T. 366]. Further, in April 1966, Leon Glavin and Chesney approached Mr. William West with the purpose of renting a machine shop from him [R. T. 386]. They indicated that they intended to store or work on a truck that apparently belonged to both of them. Chesney inquired as to the source of power [R. T. 387]. Later Leon Glavin returned and indicated that he and Chesney were partners and had two trucks [R. T. 390]. Further, that Leon's brother Roger, was with one of the trucks on business back east [R. T. 392]. At the same time Leon asked West if he, Mr. West, could shorten the wheelbase on the tractor [R. T. 392]. Apparently Chesney was in "business" with at least Leon Glavin, knew of and participated in the truck altering activities; there is good reason to believe from this that Chesney knew all that was going on, and it is not a great jump to infer that he was a participant.

There is further evidence to tie in Chesney. Concerning the short wheelbase truck: Bazil Buehler testified that on April 10, 1966, he saw Roger Glavin and Chesney working on and preparing a large black and white truck for painting [R. T. 455]. This was the identical color pattern of the stolen truck. Chesney then tried to hire Buehler to paint the truck, but Buehler refused [R. T. 457].

On May 3, 1966, Larry Rexius and Roger Glavin arrived back in California. Glavin drove to Chesney's machine shop in Glendale, got out of the truck and talked with Chesney [R. T. 253-255]. He then left, and was shortly thereafter arrested on the Ventura Freeway [R. T. 113]. It was at approximately the same time on May 3, 1966, that Chesney called Buehler on the telephone. He asked Buehler of his arrest the night before and then told Buehler essentially the following: that Roger Glavin was at Chesney's, meaning the shop; that he, Chesney, wanted Buehler to do him the favor mentioned before, that is, to get the incriminating evidence from Glavin's house, and to bring it to him, Chesney; that this was important to him [R. T. 461]. To clinch the matter, on the night that Chesney was arrested, Chesney said to Buehler as Buehler handed this material to Chesney that he, Chesney, "was glad to get it, because if it got into the wrong hands it would put them all behind bars" [R. T. 465, lines 2-6].

The direction towards which this evidence points is unmistakable to a reasonable man: that Chesney and the Glavins were in "cahoots" straight down the line. The Exhibits 9-A and 12-E merely serve to strengthen the already strong inference any jury

of reasonable men would naturally draw. The gas receipts were from a credit card bearing the name Robert L. Chesney. They showed the interstate transportation. Appellant Chesney's full name is Robert Loring Chesney. The practical man sees this as more than just coincidence. The inference is plain and highly relevant that Chesney either gave or lent his credit card to Roger Glavin to use on the business trip. In a perspective of the entire picture, it is relevant evidence to further elucidate the illegal nature of the relationship between Chesney and the Glavins. The same is true for the bill made out to Chesney truck. Counsel for appellant admits that this document was established by some foundation as being from Chesney's firm [R. T. 339], yet he says that the evidence should not have been admitted because there has been no proof that Chesney himself is the purchaser. We contend that even if Roger or Leon Glavin bought the goods, that plain common sense indicates that there is no reason nor way for men in business together to deceive each other in this way. The evidence shows the three men working together. The natural inference is that the parts were bought in conjunction with the activities of these same men. The evidence is highly relevant in this regard. We fully admit that these two pieces of evidence do not constitute the entire weight of evidence against appellants. If they did, doubtless we would have lost. We strongly suggest, however, that the evidence is very relevant in the creation of a picture of the entire operation. It is this completed picture that we were presenting to the jury and upon which they deliberated and decided.

In addition, considering Exhibit 12-E separately, the gasoline slips were also entered toward proof of the interstate nature of Roger Glavin's trip. They were admissible as such and should not be disallowed on appeal on an alternative plea that they may have prejudiced the case against Chesney.

If the court should find the admittance as evidence to be error, we urge that the case itself stands with or without either or both pieces of evidence. The weight of the evidence tying in Chesney has been discussed before.

> " . . . and the question whether prejudice results from the erroneous admission of evidence is one of practical effect when the trial as a whole and all the circumstances in the case are regarded."
>
> United States v. Tandaric, 152 F. 2d 3, 6 (7th Cir. 1945).
>
> "Where they have been received in evidence, the fact that they may have only remote relevance to the issue being tried is not ground for reversal, unless they are such as are clearly apt to have confused the jury's mind or to have improperly swayed its judgment."
>
> Phelps v. United States, 160 F. 2d 858 at 873 (8th Cir. 1947).

Neither piece of evidence can be said to have swayed the jury's judgment or confused its thought. The practical effect was at most to add to, not conclude, a fuller picture of the entire

scheme. Standing apart from the rest of the evidence, either separately or together, this evidence was but a minor item. We respectfully submit that without this evidence, the result would be the same, and today should remain so.

CONCLUSION

For the reasons set forth herein, the Government respectfully urges that the judgments and convictions of the appellants should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN JOSEPH WALSH, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 19,950 PETITION FOR REHEARING EN BANC

Comes now the appellant, by his attorney, and respectfully petitions pursuant to Rule 23, Local Rules, United States Court of Appeals for the Ninth Circuit, for a rehearing en banc of the issues raised by this appeal.

The grounds of this petition are as follows:

(a) A silent record is not sufficient to justify a holding that appellant waived his constitutional right to consult with counsel and/or remain silent. This Court should reverse its holding in Payne v. United States, 340 F.2d 748 (9th Cir. 1965).

(b) Incriminating statements made after preliminary hearing, indictment and arraignment were admitted into evidence even though appellant was without counsel. This was in clear violation of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

(c) The comment by the prosecutor on appellant's failure to take the stand was recognized as error and the instructions by

the Court, rather than curing the error, magnified it. Stewart v. United States, 366 U.S. 1, 6 L.Ed.2d 84 (1961).

(d) The conduct of the Court after the jury indicated its inability to reach a decision was coercive and requires reversal.

In support of this petition, appellant relies on the Opinion of this Court dated January 11, 1967, the papers and records on file herein and the legal authorities and arguments as set forth in appellant's Breif.

COOLEY, CROWLEY, GAITHER,
GODWARD, CASTRO & HUDDLESON

By Paul A. Renne
PAUL A. RENNE

PAUL A. RENNE, declares as follows:

That he is an attorney licensed to practice his profession in the State of California and is associated with Cooley, Crowley, Gaither, Godward, Castro & Huddleson, attorneys for appellant, and appointed by this Court and makes this certificate on behalf of petitioner herein.

Declarant has prepared said petition and certifies that it is made in good faith with no intent to delay.

The foregoing is declared under penalty of perjury.

DATED: February 10, 1967.

Paul A. Renne

PAUL A. RENNE